UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC.
Employer
and Case 7-RC-22141

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO
Petitioner

BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER
Employer
and Cases 18-RC-16415
18-RC-16416

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC
Petitioner

CROFT METALS, INC.
Employer
and Case 15-RC-8393

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO
Petitioner

BRIEF *AMICUS CURIAE* OF THE COUNCIL ON LABOR LAW EQUALITY IN RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NATIONAL LABOR RELATIONS BOARD CASES

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

LEGISLATIVE MATERIAL

OTHER AUTHORITIES

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INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a national association of employers formed to provide assistance to the National Labor Relations Board and the federal courts in the interpretation of the law under the National Labor Relations Act, and to provide legal support to employer interests through the filing of *amicus curiae* briefs and other forms of participation on those issues which affect a broad cross-section of industry.

COLLE was formed in 1981 to provide a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy. All of COLLE's members are employers subject to the National Labor Relations Act. They have a strong interest in an equitable and balanced system of labor-management relations which is important for protecting individual employee rights to engage in or refrain from collective activity, while maintaining productivity, efficiency of operations, and appropriate workplace performance in a globally-competitive economy.

COLLE appreciates the Board's invitation to file an *amicus curiae* brief on the proper interpretation and application of the Act's Section 2(11) definition of supervisory status following the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). In *Kentucky River*, the Court categorically rejected the Board's construct of the term "independent judgment" in determining supervisory status. The case arose in the context of the supervisory status of nurses who assign or responsibly direct other healthcare staff through the exercise of independent judgment informed by technical experience, skills, and training. Yet, the Court's holding extends beyond nurses in the healthcare industry to the supervisory status of any other professional or technical employees in other industries.

In *Kentucky River*, the Court encouraged the Board to structure a workable and statutorily permissible rule to resolve the issue of supervisory status in the context of assessing "independent judgment" when exercising supervisory authority "responsibly to direct" other *employees* or the manner of others' performance of discrete *tasks*. At the invitation of the Board, COLLE is pleased to submit the following *amicus curiae* brief.

STATEMENT OF THE CASE

On July 25, 2003, the Board issued a Notice and Invitation to File Briefs on issues of supervisory status arising under *Kentucky River* in the context three underlying cases. Two of those cases—*Oakwood Healthcare, Inc.*, 7-RC-221412 and *Golden Crest Healthcare Center*, 18-RC-16415 and 16416—involve the issue of whether RNs and Licensed Practical Nurses (LPNs) when serving in the capacity of charge nurses exercise independent judgment such that they should be considered Section 2(11) supervisors under the Act. See *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center v. NLRB*, 266 F.3d 785 (8th Cir. 2001) (Board employed improper legal standard in finding nurses were not statutory supervisors).The third case – *Coft Metals, Inc.*, 15-RC-8393—involves the issue of whether the Employer's lead persons and load supervisors possess sufficient authority and exercise sufficient independent judgment to satisfy the requirements for supervisory status under Section 2(11).

Specifically, in seeking to fashion the appropriate legal standard for assessing "independent judgment" sufficient for 2(11) supervisory status in these cases, and numerous cases awaiting the Board's application of such legal standard following *Kentucky River*, the Board directed interested parties to address the following issues:

1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? In particular, what is "the degree of discretion required for supervisory status," i.e.,

"what scope of discretion qualifies" (emphasis in original)? *Kentucky River* at 713. What definition, test, or factors should the Board consider in applying the term "independent judgment"?

2. What is the difference, if any, between the terms "assign" and "direct" as used in Sec. 2(11) of the Act?

3. What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?

4. What is the distinction between directing "the manner of others' performance of discrete tasks" and directing "other employees" (emphasis in original)? *Kentucky River* at 720.

5. Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? What is the distinction between a supervisor's "independent judgment" under Sec. 2(11) of the Act and a professional employee's "discretion and judgment" under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?

6. What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?

7. In further respect to No. 6 above, what, if any, difference does it make that persons in a classification (e.g., RNs) rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?

8. To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as rank-and-file employees greater autonomy and using self-regulating work teams?

9. What functions or authority would distinguish between "straw bosses, leadmen, set-up men, and other minor supervisory employees," whom Congress intended to include within the Act's protections, and "the supervisor vested with "genuine management prerogatives." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Senate Report No. 105, 80th Cong., 1st Sess., 4 (1947).

10. To what extent, if any at all, should the Board consider secondary

indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work, etc. – in determining supervisory status?

Rather than addressing each question in turn, COLLE will incorporate its recommendations in a broader discussion of the issues.

SUMMARY OF ARGUMENT

In *Kentucky River*, the Supreme Court rejected the Board's "categorical exclusion" of "ordinary professional or technical judgment in directing less-skilled employees to deliver services" from the type of "independent judgment" necessary to establish supervisory status under Section 2(11) of the Act. The Court found that the Board's construct was impermissible under the plain wording of Section 2(11) and the Act's legislative history.

The Court noted, however, that the term "independent judgment" in Section 2(11) is "ambiguous" as it relates to the "degree of discretion" consistent with supervisory status. It acknowledged that the interpretation of that term is within the Board's discretion, "within reason," to determine.

COLLE urges that, in developing a "reasonable" and "reasoned" interpretation, the Board must first consider the purposes for which "supervisors" were excluded from the Act's coverage as "employees" by the Taft-Hartley amendments in 1947. Those purposes, as clearly evidenced from the legislative history of the Act, include an employer's legitimate expectation of "undivided loyalty" from its supervisors (i.e., the absence of conflicting interests) and a higher degree of responsibility and accountability to management in exercising certain enumerated supervisory authority, including the assignment and direction of employees and/or their discrete tasks based on independent judgment informed by experience, skills and training.

COLLE concedes that the Board's task is complicated by today's restructured workplaces and new organizational designs through "self-directed teams" and other forms of work where, for example, traditional supervisors become "team leaders." COLLE asserts that while such changes should not alter the traditional factors and fundamental indicia of supervisory status under Section 2(11), it may result in more fact-specific consideration of certain secondary indicia so as to avoid unwarranted conclusions such as the Hobson's choice that "everyone's a supervisor" or "no one's a supervisor" or even "everyone's a supervisor some of the time" in today's empowered work settings. The gravamen of such determinations is one of degree, i.e., the significance of supervisory functions, for which there should be ample guidance under existing Board law. Such fact-specific analyses of supervisory status would make it appear that each case requires an individualized determination lacking precedential value. However, COLLE urges the Board to apply the standards developed over the years and through this exercise in a **balanced, equitable** and, most importantly, **consistent** fashion, rather than in a pre-determined, "result-oriented" manner for which the Board has been roundly criticized by the federal courts. The Board may still apply precedent, but must avoid the appearance of a jerry-rigged standard designed to impute liability to employers in unfair labor practice cases by finding supervisory status, while on the same or similar facts denying supervisory status in representation cases.

While COLLE certainly does not criticize the Board for being guided by standards which best effectuate the purposes and policies of the Act, it would remind the Board that such purposes and policies are also expressed in the 1947 Taft-Hartley Act amendments, including Section 2(11) of the Act.

ARGUMENT

Once again the Board is in search of that elusive "bright line test" for determining Section 2(11) supervisory status under the National Labor Relations Act ("NLRA" or "Act"). Once again the Board is forced to follow the direction and admonition of the Supreme Court with regard to the appropriate application of supervisory status, in this case pursuant to the Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S.Ct. 1861 (2001)("*Kentucky River*"). See also, *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994). And, once again the Board will be urged by interested parties to adopt a uniform standard of law to be applied to the determination of supervisory status.

Admirably, by soliciting *amicus curiae* briefs, the Board has opened the discussion for informed public comment beyond the parties directly involved in a particular case. Yet, once again, for the reasons discussed below, the Board's task in establishing a "bright line test" for supervisory status will be very difficult at best.

At the core of this ancient debate are several immutable complicating factors that have frustrated previous Boards, to say nothing of the parties themselves, in seeking certainty in determinations of supervisory status. First, of necessity, the determination of supervisory status is fact specific. Whether an employee is a supervisor, indeed whether a professional employee is a supervisor, must be determined on a case-by-case basis with reference to the individual employee's duties and responsibilities within the statutory definition of "supervisor." Professionals, as defined in Section 2(12) of the Act, who possess at least one of the supervisory functions enumerated in Section 2(11) may, and should continue to be, excluded as statutory supervisors. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681-82 (1981). See Kentucky River at 721 ("test for supervisory status applies no differently to professionals than to other employees.").

Under the Act, the definition of a "supervisor" has three elements: a person must have authority (1) "in the interest of the employer" (2) to "hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances" and (3) the exercise of such authority must not be "of a merely routine or clerical nature, but requires the use of independent judgment." All three elements must be present, but the 12 enumerated types of supervisory functions are in the disjunctive so that the authority to exercise of any one of the functions, or effectively recommend such action, satisfies the second element.

Complicating the Board's application of the Section 2(11) criteria is the dramatic change in the nature of work and the workplace brought about by technology, and the increasing sophistication and responsibilities of today's employees. Instead of organizing work based on the traditional Taylor model—i.e., reducing a process to individual steps—work becomes

restructured around whole processes, requiring interdependence, joint responsibility, and empowerment.

Over the years, the definition, interpretation and application of the term "supervisor" under Section 2(11) of the Act has spawned a law library full of litigated decisions, including hundreds before the federal courts and thousands before the Board, many with shifting and inconsistent determinations. Such fluctuations frustrate the Board and the federal courts, as well as the parties and their counsel, since one can find Board precedent for practically any outcome desired with regard to supervisory status. The only question is which precedent will a particular Board find more compelling.

The reason the definition of "supervisor" has generated such controversy is the second immutable complicating factor: the critical importance under the Act associated with the determination of "supervisory status." That determination has both practical and public policy ramifications, since statutory supervisors are outside the protections of the Act for representational purposes but not for purposes of imputing employer liability for their unfair labor practice conduct.

In its desire to extend and expand statutory protections to putative "supervisors," the Board has come under sharp criticism over the years for inconsistent application of the Section 2(11) definition. The criticism is that supervisory status depends upon whether the Board's determination, in the unfair labor practice context, has the effect of attributing liability to the employer for an individual's action, or by contrast, whether the determination protects them from an employer's sanctions. In the representation case context, of course, the criticism is that the Board's determination of supervisory status is dependent on the petitioning union's designation of voter eligibility so as to include, or exclude, putative supervisors from the voting unit. That is the pattern identified by a 1981 Harvard University study which described the Board as inconsistently applying the definition of supervisor that most widened the coverage of the Act, and maximized both the number of unfair labor practice findings it determines and the number of unions it certifies. *See*, Note, "The NLRB and Supervisory Status: An Explanation of Inconsistent Results," 94 *Harv. L. Rev.* 1713, 1718-20 (1981).

Justice Scalia, writing for the Court in *Kentucky River*, expressed a similar concern for what he described as the Board's "running struggle" to limit the number of persons qualifying for supervisory status under Section 2(11) in the election context. *Kentucky River*, 532 U.S. at 715. Indeed, Justice Scalia is not alone in the federal judiciary in noting the apparent "institutional bias," albeit well intentioned and driven by policy concerns, of gerry-rigging the Act's definition of supervisory status. The Board's application has been termed "manipulative" (3d Cir.), "well-attested manipulativeness" (7th Cir.), "tinged with opportunism" (7th Cir.), "biased mishandling" and "willingness to twist and ignore evidence in an effort to reach a preferred result" (2d Cir.), "irrational inconsistency" (4th Cir.), and has provoked at least one court to invite an employer to petition for recovery of its costs and fees because the Board "continues to misapprehend the law."(6th Cir.).

See, NLRB v. Attleboro Associates, 176 F.3d 154, 160-61 (3rd Cir. 1999)(the Board's "manipulation of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings."); *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) (criticizing the Board's "biased mishandling of cases involving supervisors" and its "willingness to twist and ignore evidence in an effort to reach a preferred result."); *NLRB v. Winneboro Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996) ("the NLRB's manipulation of the definition provided in [Section 2(11)] has earned it little deference."); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 140 LRRM (BNA) 2073, 2075-76 (8th Cir. 1992); *Beverly Enterprises, Virginia Inc. v. NLRB*, 165 F.3d 290, 295 (4th Cir. 1999) ("In applying the definition of supervisor...the Board has, we believe, manifested an irrational inconsistency."); *Caremore Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997)(inviting the employer to petition for recovery of its costs and fees because "the NLRB continues to misapprehend both the law and its own place in the legal system."); *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989)("More important than verbal niceties...is judicial impatience with the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor'"); *NLRB v. Res-Care, Inc.* 705 F.2d 1461, 1466 (7th Cir. 1983)(the Board "has laid itself open to charges that its 'supervisor' decisions have been tinged with opportunism"); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982). *See also, Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001).

Clearly, it's once again time for the Board to attempt to achieve clarity and consistency in its application of 2(11) supervisory status, even if a "bright line test" remains elusive. COLLE applauds the Board's initiative in this regard, and submits the following general observations.

I. The Meaning of "Responsibly to Direct" in the Context of Recent Developments in Management

In *Kentucky River*, the Supreme Court provided a detailed chronology of the evolution of supervisory status under the Act. Its discussion dated from the original Wagner Act (1935), which did not contain any reference to supervisors and defined "employee" expansively to include "any employee." It then considered the legislative history of the Taft-Hartley Act (1947), which at the invitation of the Supreme Court in *Packard Motor Car v. NLRB*, 330 U.S. 487 (1947), added the definition which excluded "supervisors" from the definition of employees and from the Act's protections. As noted in the Court's discussion of the legislative history of Taft-Hartley, the exclusion was purposeful so as to give management "undivided loyalty" of that group of supervisory employees and to free them from "the leveling processes of seniority, uniformity, and standardization" that characterized unions. H.R. Rep. No. 245, 80th Cong. 1st Sess. 16 (1947), reprinted at Legislative History of the Labor Management Relations Act, 1947 at 307, 308. ("Legislative History"). The Court then expanded its discussion to present day application of Section 2(11) of the Act.

There is no need to repeat that chronology, except to note the unambiguous origins of the Section 2(11) exclusion of "supervisors" and the phrase "responsibly to direct" in the list of enumerated supervisory authority which the Board has asked the *amici* to explain. In that regard, the most illuminating excerpt from the legislative history of the Taft-Hartley Act's definition of "responsibly to direct" is the following:

> [U]nder some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a larger responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instruction for its proper performance. If needed, he gives training to the performance of unfamiliar tasks to the workers to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees...." Their essential managerial duties are best defined by the words, "direct responsibly".... Legislative History (May 7, 1947) at 1303 (remarks of Sen. Flanders).

Senator Taft accepted the Flanders' amendment, emphasizing that the phrase "responsibly to direct" is to be viewed as consistent with the other enumerated factors of supervisory authority, i.e., the "responsibility" to direct. Since the list of functions included the authority or responsibility to "assign" employees, the amendment added a new factor—the authority or "responsibility" to direct the work of subordinate employees. Taken together, therefore, supervisory functions include direction of employees as well as direction of the discrete tasks of those employees.

"Modern management methods" in 1947 defined supervisors based on their exercise of authority through " personal judgment...personal experience, training, and ability." Under the clear language of the Flanders' amendment, adopted without objection by the original sponsor of Taft-Hartley, employees are "supervisors" when they determine "under general orders" the flow of work, the assignment of work, and the proper performance of the work. Although they are "above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees'" there is no limitation on their own performance of work alongside those they supervise. That is, unlike the regulatory criteria for salaried, overtime-exempt "white collar" employees developed under the Fair Labor Standards Act of 1938, 29 CFR Part 541, 29 U.S.C. §§ 201, 213(a)(1), there is no percentage of non-exempt work requirement under the National Labor Relations Act. Nor, in COLLE's view, should there be such a rigid requirement under the Act.

Supervisory authority under today's version of "modern management methods" shares many of the same characteristics as those described in the 1947 legislative debate, even though some of the terminology, such as "straw bosses, lead men, set-up men," are largely anachronistic terms no longer in general use in industry, and certainly not in the service industry, except by the Board. Thus, even where employee committees and self-directed work teams provide shared responsibility, not every employee is a supervisor nor exercises supervisory authority, which generally is exercised by "team leaders" as the functional equivalent of "supervisors." Authority to function as a "team leader" is based still on such factors as " personal judgment...personal

experience, training, and ability" and increasingly, on "technical knowledge" which enables "team leaders" to lead.

The major differences in today's "team oriented" work environments are greater worker flexibility and autonomy, increased demand for knowledge-based and information-driven job performance, and flatter, less hierarchical organizational structures with fewer, simpler job classifications. Such work environments often involve shifting roles within a "team" where an employee may be a "team leader" one day, or for one function, and not the next. Admittedly, this makes it more difficult to apply the Act's traditional tests for determining Section 2(11) supervisory status, since coverage by or exclusion from the Act's protections may be based on being a "supervisor" one day and not the next, or only while exercising supervisory authority with a team for one function and not the next.

In that case, where the exercise of Section 2(11) supervisory status fluctuates based on the operation of a "team" within a particular workplace, the Board may be advised to apply the traditional tests and then also consider additional criteria based on the individual's authority and the frequency or duration in which the individual has the ability to exercise such authority. Especially in a flatter, less structured workplace, the Board also may consider secondary indicia of supervisory status.

However, if the individual meets the Act's traditional 2(11) supervisory indicia, the Board should not deny supervisory status merely because the supervisor possesses supervisory authority on a part-time or rotating basis shared with other employees, nor on the time spent in performing bargaining unit work (cf. percentage of time spent on "exempt work" in determining "white collar" exemptions under 29 CFR Part 541 interpreting the Fair Labor Standards Act of 1938, 29 U.S.C. §§ Sections 201, 213(a)(1)), nor on the ratio of supervisors to subordinate employees. Such secondary indicia should not be controlling where the individual meets the traditional supervisory indicia under Section 2(11). The key consideration, perhaps, is one of "significance"—the significance of supervisory direction in the interest of the employer and whether such authority is exercised or available for a significant, albeit fluctuating, length of time, involving supervisory functions, in the words of Section 2(11) of the Act, that are not "merely routine or clerical [in] nature."

Consideration of secondary indicia as guidelines should not interfere with, but rather supplement, the traditional consideration of a supervisor's authority "responsibly to direct" other employees or their work performance (which is different from the independent disjunctive criteria of "assigning" work, which is, and has always been, sufficient in and of itself as one of the twelve criteria to establish supervisory status). The first determination must be whether the alleged supervisor meets one or more of the twelve supervisory functions enumerated in Section 2(11) and whether such authority is "in the interest of the employer." Determining whether an alleged supervisor "responsibly" directs other employees or the discrete tasks of those employees has a well defined history: if the supervisor is "answerable" or "accountable" to the employer for the performance or work product of other employees, that constitutes both "responsible" direction and "in the interest of the employer" sufficient to satisfy those elements of Section 2(11).

The phrase "responsibly to direct" speaks more to accountability than capability. That is, "in determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs." *NLRB v. Quinnipiac College*, 256 F.3d 68, 77 (2d Cir. 2001) ("[A]ccountability for another's failure to perform a duty establishes as a matter of law an employee's supervisory power responsibly to direct." *Id.*). Under established Board and federal court law, a supervisor "responsibly" directs his subordinates if he is "answerable" or "accountable" to management for the performance of work or a work product of those subordinates. *Providence Hospital*, 320 NLRB 717, 151 LRRM (BNA) 1177, 1190 (1996); *NLRB v. Quinnipiac College, supra*; *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 154 LRRM (BNA) 2545 (2d Cir. 1997); *NLRB v. Adam & Eve Cosmetics*, 567 F.2d 723, 97 LRRM (BNA) 2173 (7th Cir. 1977); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 549-50 (9th Cir. 1960).

That law should not change as a result of today's version of "modern management methods." The Board should continue to be guided by the fundamental indicia of supervisory status in the Act and as written by Congress when it first spoke of "modern management methods" in 1947 based on the "significance" of supervisory authority.

II. "Independent Judgment," "Responsibly to Direct" and the "Degree of Discretion" in the Board's Post-*Kentucky River* Analysis of Supervisory Status

In recent years, the Board has restricted the interpretation and application of "independent judgment" in determining supervisory status, especially in the context of healthcare personnel. Although initially the Board sought to delimit supervisory status using the so-called "patient care analysis" to interpret the Section 2(11) phrase "in the interest of the employer"(as opposed to the Board's phrase in the "interest of the patient") the Supreme Court strongly rejected such "manipulation" as a "false dichotomy" in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 114 S.Ct. 1778 (1994).

Thereafter, post- *Health Care*, the Board issued a series of decisions delimiting the 2(11) supervisory exclusion based on "independent judgment" of professional or technical employees. In *Providence Hospital,* over the strong dissent of Member Cohen, the Board majority held that a charge nurse did not exercise supervisory "independent judgment" in directing less-skilled employees because such judgment was based on professional or technical skill or experience, even if that judgment is significant and only loosely constrained by the employer. As Member Cohen said in his dissent, the majority sought "to achieve the same result [as pre-*Health Care*]" by misinterpreting "independent judgment" and ignoring clear legislative history of the phrase "responsibly to direct." 320 NLRB 717 (1996), enf'd sub nom *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997). See Member Cohen's dissent at 320 NLRB at 736.(citing Sen. Flanders' statement and amendment to Section 2 (11), at Legislative History of the Labor Management Relations Act, 1947 at 1303.)

In *Ten Broeck Commons*, the Board again found that licensed practical nurses were not statutory supervisors again based on the reason that they did not exercise "independent

judgment" in assigning or directing work. *Ten Broeck Commons*, 320 NLRB 806 (1996). Member Cohen again dissented, again relying on legislative history, and stated:

> [T]he essence of independent judgment is that the individual's actions are based on the thought processes of that individual, rather than on some outside force or person. Certainly, an individual who makes a "personal judgment based on personal experience, training and ability" is making an independent judgment."

320 NLRB at 815. *See* King, Roger, "Where Have All the Supervisors Gone—The Board's Misdiagnosis of Health Care & Retirement Corp." *The Labor Lawyer* 343 (1997).

Finally, in *Mississippi Power*, the Board further limited the definition of a 2(11) supervisor applied to distribution dispatchers and system dispatchers for a utility company. The Board held, over the vigorous dissents of Members Hurtgen and Brame, that even though the putative supervisors assigned and directed field employees, they were not supervisors. The majority's rationale was "the principle that the exercise of even critical judgment by employees based on their experience, expertise, know-how, or formal training and education does not, without more, constitute the exercise of supervisory judgment." *Mississippi Power*, 328 NLRB 965, 970 (1999). Of course, dissenting Members Hurtgen and Brame noted that for nearly half a century the federal courts had "overwhelmingly found" that such individuals who monitored the transmission and distribution of power for utility companies "responsibly directed employees through the use of independent judgment" and were supervisors. *Id.* at 975.

It was this same flawed interpretation of "independent judgment" and it's application to the phrase "responsibly to direct" that caused Justice Scalia in *Kentucky River* to exclaim plaintively:

> What supervisory judgment worth exercising, one must wonder, does not rest on "professional or technical skill or experience"? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate "supervisors" from the Act.

532 U.S. at 714-15.

Clearly, therefore, after *Kentucky River* the Board must fashion a reasonable standard in which even "ordinary" professional or technical judgment used in directing less-skilled employees to deliver services constitutes "independent judgment" where it is significant and only loosely constrained by the employer. Of course, as the Court also noted, "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." Id. at 715. However, "independent judgment" is not synonymous with unreviewable discretion, and a finding of supervisory status is consistent with higher management review and established, written policies

and procedures. Once again, the key consideration is one of "significance" and degree of the employer's constraints on the exercise of supervisory authority and independent judgment.

Here again, the Board has ample precedent to determine whether an employer's instructions are loosely constrained guidance for its supervisors, or "team leaders" as the case may be, or whether such detailed orders and regulations constitute excessive employer constraint over the supervisor's exercise of independent judgment. A recent Board case which illustrates excessive employer constraint is *Dynamic Sc., Inc.*, 334 NLRB No.57, 167 LRRM (BNA) 1237, 1238 (2001):

> The Employer's test leaders,...run tests of military artillary, weapons, and armaments for the United States Army. Each working day, a stipulated supervisor provides the test leaders with detailed assignment sheets. These sheets detail the test leaders' daily activities, including: where he will be reporting; which testers will be on his crew; and what equipment he and his crew will be testing. Upon reaching the assigned site, the test leader checks in with the on-site test director, who provides additional instructions, such as what equipment needs to be set up and where exactly the test is to be executed. Depending on the equipment being tested, the test director will even specify the distance between the equipment and the target. In setting up the equipment, the leader and his crew are also required to follow written standard operating procedures that are provided by the manufacturer at each test site.
>
> * * *
>
> The evidence shows that the test leaders' role in directing employees is extremely limited and circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures. Consequently, the degree of judgment exercised by the test leaders falls below the threshold required to establish statutory supervisory authority. *See Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), cited with approval in *Kentucky River*.

An example of independent judgment "loosely constrained" by the employer sufficient to determine supervisory status is *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923 (5th Cir. 1993):

> ... Michael Ward, a shift operator testifying on behalf of the union, stated that the lead operator on his shift "tells me what to do around the plant" and "checks up on you from time to time to see what the job...is done." If the workers fail to complete their assigned tasks, the lead operator instructs them to do so. This also demonstrates that lead operators exercise independent judgment and responsibly direct other employees. See Id. (noting that ordering an employee to correct a mistake requires an exercise of independent judgment).

Also, under established Board law a supervisor uses "independent judgment" if she makes discretionary judgments regarding the relative strengths, weaknesses, and abilities of her subordinates and varies her work assignments in accordance with such judgments. *International Union of Operating Engineers*, 283 NLRB 734, 737 (1987) (finding supervisory status based on "who decides which employee is best qualified to operate the equipment and his decision is based on his independent evaluation of the employee's capabilities."); *Cannon Industries, Inc.*, 291 NLRB 632, 636 (1988); *Impact Industries, Inc.*, 285 NLRB 5, 11 (1987); *Brusco Tug & Barge v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001); *Dynamic Machine Co. v. NLRB*, 552 F.2d 1195 (7th Cir. 1977); *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893 (7th Cir. 1981).

COLLE submits that the Board has ample precedent on which to base determinations of the exercise of "independent judgment" which is, after all, a case-by-case, fact-specific determination. In today's empowered workplace, with self-directed, "self-regulated" teams, greater numbers of employees are given authority to exercise judgment in the performance of their jobs. The critical factor for the Board to determine is whether that authority extends to others in the performance of their tasks, not simply in the performance of one's own job responsibilities, and whether such day-to-day supervisory authority is only loosely constrained by the employer through general operating procedures rather than rigid, detailed and tightly constrained regulations.

III. The Board Should Not Adopt an Overly-Restrictive "Limiting Interpretation" of "Independent Judgment" in its Analysis of "Responsibly to Direct" as a Supervisory Factor

The Supreme Court also invited the Board to consider "a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*." 532 U.S. at 720. (emphasis in original). In that context, and for the reasons stated above in COLLE's discussion of the word "assign" and the phrase "responsibly to direct," COLLE asserts that there should be no difference in the "independent judgment" required between the two statutory functions of a supervisor.

If, however, the Board accepts the Court's invitation and fashions a limiting rule, COLLE encourages the Board to adopt a flexible, fact-specific test, rather than a single, wooden one, that continues to allow for both functions—directing the performance of tasks and directing other employees—as legitimate supervisory functions. *See, e.g., In re Sheet Metal Workers Int'l.*, 2003 WC 21273871 (2003) (construction foremen are supervisors where they exercise independent judgment in determining how, when and by whom discrete job tasks were to be performed).

There can be little argument that the authority to direct others' performance of work is an equally important supervisory function as the other enumerated indicia of supervisory status. In fact, it is customarily the most common, and therefore most frequently exercised, supervisory function on a day-to-day basis. Arguably, in the interest of the employer, it is also the most important supervisory function in most traditional workplaces and the one that requires the greatest exercise of independent judgment.

Therefore, COLLE suggests that the statute itself already provides the appropriate constraints on the interpretation and application of Section 2(11) supervisory status with regard to the responsibility to direct others' performance of work. That is, direction of the performance of others' discrete tasks is supervisory "if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 152(11).

It is difficult, if not impossible, to fashion a single rule that would encompass the myriad factual permutations of directing work tasks and work performance. What may be significant in one context, may be routine in another. For example, in the *Dynamic Services* case quoted above, if the facts had been that the test leaders had the authority, only loosely constrained by employer regulation, to direct their crew to set off the artillary aimed in a particular direction, such supervisory authority would be far more significant than if the test leaders merely directed their crew to wear protective equipment while on the test site....although both directions would be exercising supervisory authority "in the interest of the employer."

The Board has a long history of deciding what is "merely routine or clerical" in the context of Section 2(11) and it should rely on that precedent. Obviously, in any determination of supervisory status, one party or the other will disagree with the Board's interpretation. The most important consideration, however, is that the Board make such decisions in a consistent, equitable, and balanced manner so that reviewing courts, and the parties themselves, while disagreeing with the outcome, can no longer assail the Board as being "manipulative" or "biased" in applying the law to reach a preferred, predetermined outcome.

Further, in fashioning a reasonable standard for supervisory status following the admonition in *Kentucky River*, the Board should consider the original Congressional intent in creating a statutory exclusion for "supervisors." As indicated in the legislative history of the Taft-Hartley Act:

> [Supervisors] have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such "security." It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization....

H.Rep. 245 on H.R. 3020, Legis. Hist. 307-308. *See, NLRB v. Bell Aerospace*, 416 U.S. at 281, n.11 (1974).

As one court has noted with regard to the origins of the Act's supervisory exclusion in the context of interpreting the phrase "independent judgment":

> ... the legislative history of Section 2(11) clarifies the meaning of the independent judgment requirement. Section 2(11) was added by the Taft-Hartley Act. In enacting that section, Congress was concerned about the effect of unrestricted unionization of first-line supervisors. Congress believed that fraternal union feelings would tend to impair a supervisor's ability to apply his employer's policy to subordinates according to the employer's best interests. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 85 LRRM 2945 (1974); *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 660, 86 LRRM 2196 (1974). It withdrew certain protections from "supervisory" employees in order to give employers more freedom to prevent a pro-union bias from interfering with the independent judgment of employees holding supervisory positions.

NLRB v. Pilot Freight Carriers, 558 F.2d 205, 95 LRRM (BNA) 2900, 2902 (4th Cir. 1977). Accord: *NLRB v. Winnebago Television Corp.* 75 F.3d 1208, 151 LRRM (BNA) 2493, 2497 (7th Cir. 1996) (The goal that motivated Congress to exclude supervisors from the coverage of the Act was to avoid potential "conflicts of interests as supervisors balanced their loyalties to the union with those to their employer.")

Congressional desire to avoid "divided loyalties" or conflicting interests between supervisors and subordinate bargaining unit employees is an important statutory policy. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 687-88 (1980). It has been described as the "dominant purpose" of the Section 2(11) exclusion, *Beasley v. Food Fair, Inc.*, 416 U.S. 653, 661-62 (1974), and the "primary objective" of Congress in enacting Section 2(11). *NLRB v. Retail Clerks Int'l Assn.*, 211 F.2d 759, 763 (9th Cir. 1954). See H.R. Rep. No. 245, 80th Cong., 1st Sess. 14 (1947) ("The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purposes of the Act.").

Certainly, the Congressional purposes for excluding such persons in 1947 are equally prevalent in today's workforce, and today's supervisors and "team leaders," by any name, continue to exercise independence in today's empowered, self-directed workplace teams. Such individuals continue to exercise supervisory authority "in the interests of the employer," to assign employees, or "responsibly to direct" such employees or their work, especially in today's workplace, through knowledge-based, informed independent judgment.

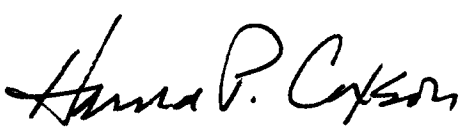
CONCLUSION

The Board must not devise contrived, strained interpretations, as it did in *Kentucky River*, *Health Care* and the post-*Health Care* cases, which would be designed, in the Supreme Court's words, simply "to limit the...number of employees qualifying for supervisory status—presumably driven by the policy concern that otherwise the proper balance of labor-management power will be disrupted." *Kentucky River*, 532 U.S. at 713. As much as some groups would like to write the supervisory exclusion out of the Act entirely, or accomplish the same objective by an

overly-restrictive "limiting interpretation" of supervisory status, those wishes are for Congress and not the Board to fulfill.

While the Board must always be cognizant of effectuating the underlying purposes of the Act and its public policy imperatives, when acting within its broad discretion, "within reason," to interpret the Act the Board must not ignore the plain wording of the statute and its legislative history. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). That includes the legislative history and Congressional policies of Section 2(11). To do so would only invite further judicial criticism and diminution of judicial deference accorded the agency's rulings.

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC.
Employer
and Case 7-RC-22141

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO
Petitioner

BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER
Employer
and Cases 18-RC-16415
18-RC-16416

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC
Petitioner

CROFT METALS, INC.
Employer
and Case 15-RC-8393

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2003, a true and correct copy of the foregoing Brief *Amicus Curiae* of the Council on Labor Law Equality was filed at the invitation of the National Labor Relations Board and served by first-class mail, postage pre-paid, on the following parties:

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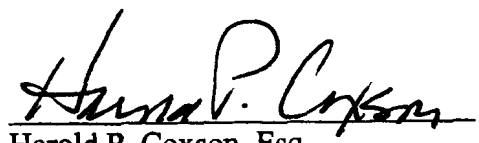

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